

**STATE OF INDIANA
DEPARTMENT OF STATE REVENUE**

IN REGARDS TO THE MATTER OF:

**IMPROVED BENEVOLENT PROTECTIVE
ORDER OF ELKS, LODGE, #772, ET AL.
DOCKET NO. 01-0070**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DEPARTMENTAL ORDER**

An administrative hearing was held on Thursday, September 13, 2001 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Improved Benevolent Protective Order of Elks Lodge #772, was represented by Pat Ragains of Smith & Ragains, 936 Meridian Plaza, Anderson, Indiana 46016. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-1, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Departmental Order.

REASON FOR HEARING

On February 14, 2001 the Indiana Department of Revenue determined that an emergency existed that required the immediate termination of Petitioner's gaming operations and a revocation of the organization's charity gaming license. The Department imposed civil penalties and suspended the organization and two individuals from associating with charity gaming for a period of three years each. The Petitioner protested in a timely manner.

SUMMARY OF FACTS

- 1) Pursuant to IC 4-32-12-2 the Petitioner was assessed a civil penalty for violating IC 4-32-9-15.
- 2) Petitioner conceded at hearing, that they had violated IC 4-32-9-15 by contracting with an individual to conduct their charity gaming.
- 3) Pursuant to IC 4-32-12-2 Petitioner was assessed a civil penalty for violating IC 4-32-9-29.
- 4) Petitioner conceded that they had employed workers who were not members in violation of IC 4-32-9-29.
- 5) Pursuant to IC 4-32-12-2 the Petitioner was assessed a civil penalty for violating IC 4-32-9-25.

- 6) The Department assessed the Petitioner civil penalties for paying a total of twelve (12) workers. The Petitioner admitted to paying only two (2) workers. In regards to the question of paying workers, the Hearing Officer is at odds in trying to see why Petitioner's counsel would question a lack of records on the Department's part when their own witness told investigators that there were no records. Does this mean that records did exist, and Petitioner's witness lied to investigators?
- 7) The Petitioner failed to overcome its burden to prove that they did not pay the other ten workers.
- 8) Petitioner violated IC 4-32-9-25 by providing operators and workers with remuneration.
- 9) Pursuant to IC 4-32-12-2 the Petitioner was assessed civil penalties for violating IC 4-32-12-1(a).
- 10) The operation of thirteen (13) illegal gambling machines by an organization licensed by the State of Indiana to conduct charitable gaming is a violation of IC 4-32-12-1.
- 11) The Department, pursuant to IC 4-32-12-3, imposed a three (3) year prohibition upon the Petitioner (Improved Benevolent Protective Order of Elks Lodge #772), RT, and LR from conducting or associating with charity gaming.
- 12) Mr. Russell and the other two operators listed on Petitioner's CG-13 are equally responsible for the above infractions.

FINDINGS OF FACT

- 1) The Department's investigator testified under oath that the Petitioner entered into an agreement with RT to operate its charity gaming in exchange for payment. The Petitioner's operators RT and LR both told the Department's investigator that the agreement existed. (Record at pgs. 11-13).
- 2) The Department's Exhibit #3 consisted of a handwritten document dated January 7, 2000. The document appears to be a contract to use the Petitioner's facilities, provide catering, and to conduct gaming between the Petitioner and RV. The only signature on the agreement is Ms. V who is listed as an operator. (Dept. Exhibit #3).
- 3) The Petitioner conceded during the hearing that, "...there was a contract between RT and LR to operate the bingo operation..." (Record at pgs. 6-7).
- 4) The Department's investigator testified under oath that individuals who worked charity gaming for the Petitioner were not members. (Record at pg. 13).
- 5) The Department's investigator testified under oath that during an interview with a former worker, it was verified that she was paid for working the Petitioner's charity gaming events. (Record at pg. 20).

- 6) Additionally, the former worker testified under oath at the hearing that she personally paid the remainder of the eleven workers, and that the operators paid themselves from the petty cash. (Record at pgs. 21-23).
- 7) The Petitioner admits that only two workers out of twelve were actually paid. (Record at pg. 44).
- 8) Petitioner's counsel questioned why the Department was not able to produce records of these payments, and whether a subpoena was issued for those records. (Record at pg. 19). But it was Petitioner's own witness that told investigators initially that there were no payment records. (Record at pg. 19).
- 9) Petitioner did not call the other eleven workers on the list as witnesses, nor did Petitioner provide simple affidavits from these individuals stating that they did not receive payment.
- 10) The Department's investigator testified under oath that, she was told by Petitioner's witness, that a total of thirteen (13) gambling machines were at the Petitioner's location. (Record at pg. 18).
- 11) The Department's other witness also testified under oath, that she had personal knowledge of the machines and that there were a total of thirteen (13). (Record at pg. 23).
- 12) Petitioner's counsel questioned if the Department's investigator had seen the machines, and their location. (Record at pg. 18).
- 13) Petitioner's own witness testified that the machines had been removed prior to his conversation with the Department's investigator. (Record at pg. 41).
- 14) Petitioner first argues that the Department's investigator did not actually see the machines on the premises. Second, Petitioner argues that there were fewer machines than what was described by the Department, but the Petitioner's witness could not remember how many there actually were. (Record at pg. 39).
- 15) The Petitioner's witness, who was listed on the CG-13 (Dept. Exhibit #1) as an operator, stated that the machines were in the vicinity of the bingo hall. (Record at pg. 40). He also stated that the Lodge had to pay approximately two thousand dollars (\$2,000) to the owner of the machines to have them removed from the premises. (Record at pg. 41).
- 16) Petitioner did have control over the machines, and as an operator was responsible for conducting charity gaming.
- 17) The Petitioner's witness could not guarantee that the machines were locked in a room at all times. (Record at pg. 37).
- 18) As a result of the Indiana Department of Revenue's investigation, RT and LR were prohibited from conducting or associating with charity gaming for a period of three (3) years.
- 19) RT failed to protest the Department's action against her. Her name appears on a handwritten contract entered into with the Petitioner.
- 20) LR appeared at the hearing and testified under oath on behalf of the Petitioner. As an operator, Mr. Russell is the person of authority on the premises while the charity gaming is taking place.

STATEMENT OF LAW

- 1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's findings are correct. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
- 2) IC 4-32-9-15 states, "A qualified organization may not contract or otherwise enter into an agreement with an individual...to conduct an allowable event for the benefit of the organization. A qualified organization shall use only operators and workers meeting the requirements of this chapter to manage and conduct an allowable event."
- 3) IC 4-32-9-29 states, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
- 4) The remuneration of operators and workers is illegal pursuant to IC 4-32-9-25.
- 5) IC 4-32-12-1 states, "The department may suspend...an individual under this article for any of the following: (1) Violation of a provision of this article or of a rule of the department... (5) Conduct prejudicial to the public confidence in the department..."
- 6) IC 4-32-12-3 provides, "In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following...(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization."

CONCLUSIONS OF LAW

- 1) At hearing the Petitioner conceded the fact that it entered into an agreement with RT to operate its charity gaming in exchange for payment, a violation of IC 4-32-9-15.
- 2) At hearing the Petitioner conceded that fact that individuals who worked charity gaming for the Petitioner were not members, a violation of IC 4-32-9-29.
- 3) Petitioner paid twelve (12) workers in violation of IC 4-32-9-25.
- 4) The operation of thirteen (13) illegal gambling machines by an organization that it licensed by the State of Indiana to conduct charitable gaming is conduct that the Department finds prejudicial to the public confidence.
- 5) An operator is responsible for supervising and directing other people working at the event, and in addition is responsible for making the required financial reports of the event. In light of the above infractions, it is clear that Petitioner failed to conduct charity gaming in a manner consistent with Indiana law.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge recommends the following:

RT is prohibited from conducting or associating with charity gaming for a period of three (3) years. LR is prohibited from conducting or associating with charity gaming for a period of one (1) year. The Petitioner, Improved Benevolent Protective Order of Elks Lodge #772 is prohibited from conducting or associating with charity gaming for a period of three (3) years. All civil penalties imposed upon the Petitioner by the Department are hereby upheld.

- 1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Letter of Findings.
- 2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Letter of Findings and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.
- 3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.
- 4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.
- 5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Letter of Finding to the Court of proper jurisdiction.

THIS DEPARTMENTAL ORDER CONSTITUTES THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN SEVENTY-TWO (72) HOURS FROM THE DATE THE ORDER IS ISSUED.

Dated: _____

Bruce R. Kolb / Administrative Law Judge